

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



**ORIGINAL**

**76-1487**

*To be argued by*  
GUY L. HEINEMANN

B  
PJS

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

Docket No. 76-1487

UNITED STATES OF AMERICA,

*Appellee,*

*against*

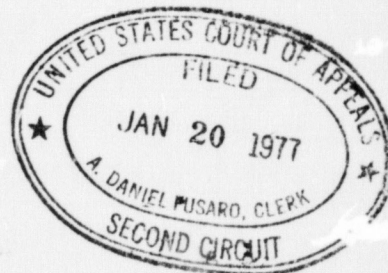
WALLACE JARVIS,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF OF THE APPELLANT WALLACE JARVIS**

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Cases. . . . .	
PRELIMINARY STATEMENT . . . . .	1
ISSUES PRESENTED. . . . .	1-A
STATEMENT OF FACTS. . . . .	2
A. INTRODUCTION. . . . .	2
B. THE ROBBERY . . . . .	2
C. THE ARREST OF BLANCHARD AND BOWMAN. . . . .	4
D. THE EARLY PHOTOGRAPHIC IDENTIFICATIONS. . . . .	6
E. THE ARREST OF JARVIS. . . . .	9
F. MORE PHOTOGRAPHS AND A LINEUP . . . . .	10
G. THE PRETRIAL HEARING. . . . .	13
H. THE TRIAL . . . . .	14
I. DR. BUCKHOUT'S TESTIMONY. . . . .	15
ARGUMENT	
POINT ONE	
THE ARREST OF JARVIS BY FORCIBLE ENTRY INTO HIS RESIDENCE AND WITHOUT A VALID WARRANT WAS UNLAWFUL AND THE PALMPRINT AND SUBSEQUENT EYEWITNESS IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED. . . . .	18
A. UNDER THE CIRCUMSTANCES OF THIS CASE, THE FOURTH AMENDMENT REQUIRES A VALID WARRANT TO MAKE A FORCIBLE ENTRY INTO A PRIVATE DWELLING TO MAKE AN ARREST. . . . .	19
B. THE "JOHN DOE" WARRANT IN THIS CASE WAS INVALID . . . . .	25

	<u>Page</u>
C. THE PALMPRINT AND PHOTOGRAPHS TAKEN OF JARVIS WERE FRUITS OF HIS ILLEGAL ARREST AND SHOULD HAVE BEEN SUPPRESSED. . . . .	29
1. The Palmprint Testimony . . . . .	31
2. The Eyewitness Identification . . . . .	33
 POINT TWO	
THE UNNECESSARILY AND IMPERMISSIBLY SUGGESTIVE PRE-TRIAL TACTICS USED TO OBTAIN THE EYE-WITNESS IDENTIFICATIONS SHOULD HAVE RESULTED IN THE EXCLUSION OF SUCH TESTIMONY . . . . .	36
A. AGENT WICHNER'S TELLING THE WITNESSES WHETHER THEIR IDENTIFICATIONS WERE CORRECT OR INCORRECT. . . . .	36
B. THE REPEATED SHOWING OF THE SURVEILLANCE PHOTOGRAPHS AND THE PHOTOGRAPHIC "MONTAGE". . . . .	38
C. THE REPEATED APPEARANCE OF JARVIS IN SEVERAL OF THE TESTS . . . . .	40
 POINT THREE	
THIS COURT UNDER ITS SUPERVISORY POWERS OVER FEDERAL PROSECUTIONS SHOULD REVERSE THE CONVICTION BELOW . . . . .	43
CONCLUSION. . . . .	45

# TABLE OF CASES

	<u>Page</u>
<u>Brathwaite v. Manson</u> , 527 F.2d 363 (2d Cir. 1975), <u>cert. granted</u> , ____ U.S. ____ (1976) . . . . .	.35, 36, 42
<u>Brown v. Illinois</u> , 422 U.S. 590 (1975) . . . . .	.31
<u>Bynum v. United States</u> , 262 F.2d 465 (D.C. Cir. 1958) . . . . .	.32
<u>Commonwealth v. Crotty</u> , 10 Allen 403 (Sup. Ct. Mass.) . . . . .	.28-A
<u>Commonwealth v. Forde</u> , 329 N.E.2d 717 (Sup. Ct. Mass. 1975) . . . . .	.20, 24
<u>Connor v. Commonwealth</u> , 363 Mass. 572 (1973) . . . . .	.28-A
<u>Connor v. Picard</u> , 434 F.2d 673 (1st Cir. 1970), <u>reversed</u> , 404 U.S. 270 (1971) . . . . .	.28-A
<u>Davis v. Mississippi</u> , 394 U.S. 721 (1969) . . . . .	.32
<u>Dorman v. United States</u> , 435 F.2d 385 (D.C. 1970) (en banc) . . . . .	.20, 30
<u>Foster v. California</u> , 39 U.S. 440 (1969) . . . . .	.40
<u>Frisbie v. Collins</u> , 342 U.S. 519 (1952) . . . . .	.31
<u>Hogan v. Poderick</u> , 399 F.Supp. 1014 (E.D. Va. 1975) . . . . .	.40
<u>McNabb v. United States</u> , 318 U.S. 332 (1943) . . . . .	.43, 44

Page

<u>Mysholowsky v. People of the State</u> <u>of New York</u> , 535 F.2d 194 (2d Cir. 1976). . . . .	.39
<u>People v. Ramey</u> , 545 P.2d 1333 (Sup. Ct. Cal. 1976). . . . .	.20, 21, 24, 30
<u>Salvatore v. United States</u> , 505 F.2d 1348 (8th Cir. 1974) . . . . .	.20
<u>State v. Lasley</u> , 236 N.W.2d 604 (Sup. Ct. Minn. 1975) . . . . .	.20
<u>Stovall v. Denno</u> , 388 U.S. 293 (1967). . . . .	.36
<u>United States v. Barragan-Martinez</u> , 504 F.2d 1155 (9th Cir. 1974) . . . . .	.33
<u>United States v. Bernstein</u> , 509 F.2d 996 (4th Cir. 1975) . . . . .	.28
<u>United States v. Ceccollini</u> , 542 F.2d 136 (2d Cir. 1976). . . . .	.31
<u>United States v. Doe</u> , 401 F.Supp. 63 (E.D. Wis. 1975). . . . .	.28-A
<u>United States v. Eatherton</u> , 519 F.2d 603 (1st Cir. 1975) <u>cert. denied</u> , 423 U.S. 987 (1975). . . . .	.41

	Page
<u>United States v. Edmons</u> , 432 F.2d 577 (2d Cir. 1970) . . . . .	33,34
<u>United States v. Estepa</u> , 471 F.2d 1132 (2d Cir. 1972) . . . . .	43,44
<u>United States v. Jacobs</u> , F.2d (2d Cir. December 30, 1976; Slip. Op. 1187 . . . . .	43,44
<u>United States v. Johnson</u> , 452 F.2d 1363 (D.C. Cir. 1971) . . . . .	33
<u>United States v. Karathanos</u> , 531 F.2d 26 (2d Cir. 1976) cert. denied U.S. (1976) . . . . .	30,31,32
<u>United States v. Phillips</u> , 497 F.2d 1131 (9th Cir. 1974) . . . . .	20
<u>United States v. Rosario</u> , 543 F.2d 6 (2d Cir. 1976) . . . . .	28A,29
<u>United States v. Russell</u> , 532 F.2d 1063 (6th Cir. 1976) . . . . .	15,38
<u>United States v. Santana</u> , U.S. 44 U.S.L.W. 4970 (1976) . . . . .	20,21
<u>United States v. Shye</u> , 492 F.2d 886 (6th Cir. 1974) . . . . .	20
<u>United States v. Swanner</u> , 327 F.Supp. 69 (E.D. Tenn. 1974) . . . . .	27,28
<u>United States v. Toscanino</u> , 500 F.2d 267 (2d Cir. 1974) . . . . .	31
<u>United States v. Watson</u> , 423 U.S. 411 (1976) . . . . .	20,21,22,23,44
<u>United States ex rel. Pella v. Reid</u> ; 527 F.2d 380 (2d Cir. 1975) . . . . .	34,35
<u>United States ex rel. Savage v. Arnold</u> ; 403 F. Supp. 172 (E.D. Penn. 1975) . . . . .	28

	Page
<u>Vance v. North Carolina</u> , 432 F.2d 984 (4th Cir. 1970) . . . . .	20
<u>Warden v. Hayden</u> , 387 U.S. 294 (1967). . . . .	31, 32
<u>Weeks v. United States</u> , 232 U.S. 383 (1974). . . . .	30
<u>West v. Cabell</u> , 153 U.S. 78 (1894). . . . .	22, 25, 26, 27, 28, 28A
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963). . . . .	33

UNITED STATES COURT OF APPEALS  
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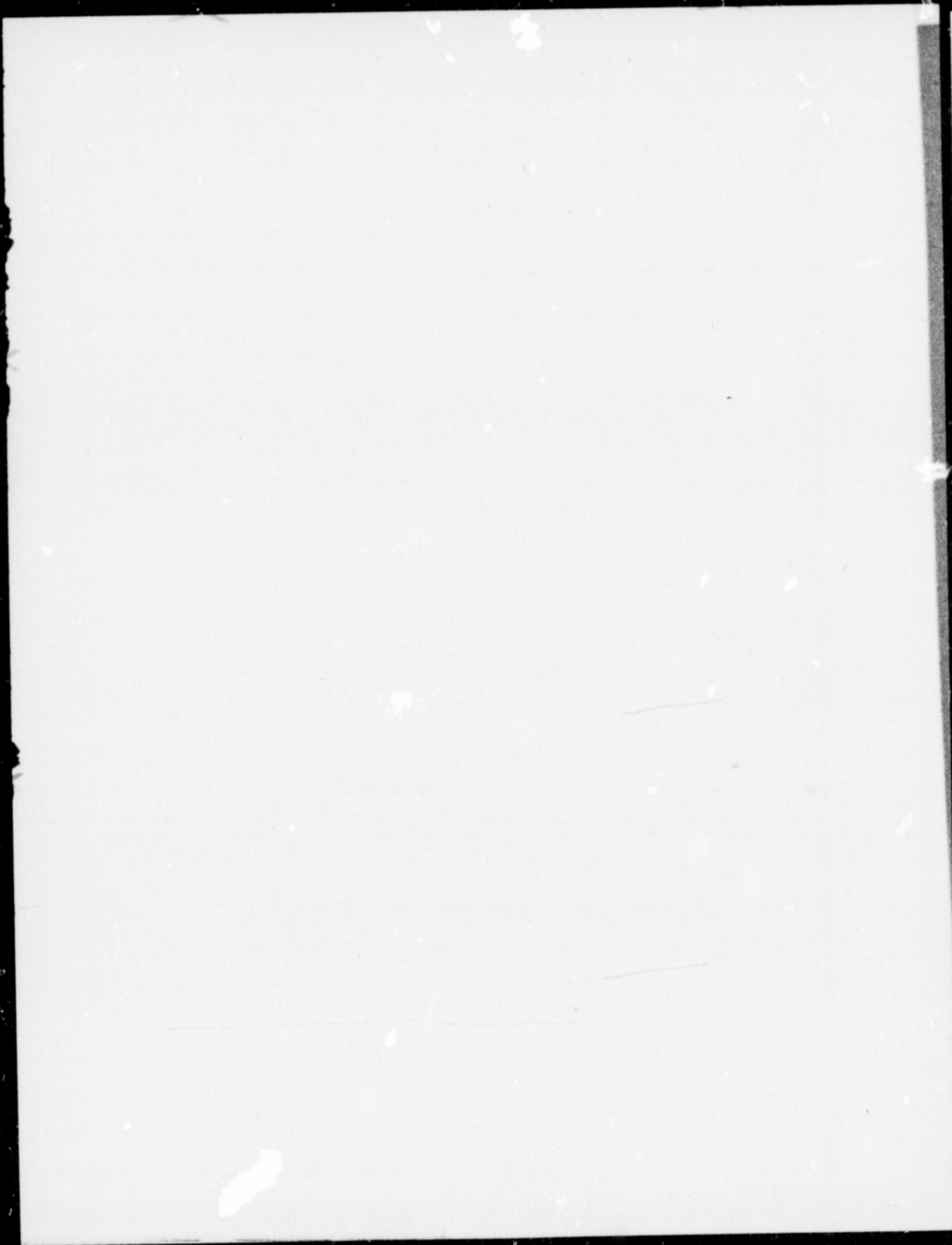
UNITED STATES OF AMERICA,	:	
Appellee,	:	Docket No.
- against -	:	76-1487
WALLACE JARVIS,	:	
Defendant-Appellant.	:	

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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Wallace Jarvis appeals from a judgment of the United States District Court for the Eastern District of New York (Honorable George C. Pratt, District Judge) sentencing him after a jury verdict, to five years imprisonment for armed bank robbery in violation of Title 18, United States Code, Section 2113(d). The trial took place in July of 1976 and sentence was imposed on September 24, 1976. Appellant Jarvis is currently enlarged on bail pending his appeal to this Court.



### ISSUES PRESENTED

1. Does the Fourth Amendment require a warrant to make a forcible entry and arrest inside a defendant's home, absent exigent circumstances?
2. Is a warrant for the arrest of "John Doe" without further description a valid arrest warrant?
3. Did the District Court commit reversible error in failing to suppress the eyewitness testimony and palmprint evidence as the fruits of an illegal arrest?
4. Were the pre-trial procedures used in obtaining eyewitness identification so impermissibly suggestive that the eyewitness testimony at trial should have been excluded?

## STATEMENT OF FACTS

### A. INTRODUCTION

The relevant facts in this case, concerning both the pre-trial investigation as well as the government's proof at trial, are set forth in chronological order below.

### B. THE ROBBERY

On a snowy afternoon, February 2, 1976, the European American Bank at 3121 Thompson Avenue, Long Island City, was robbed at gunpoint by two black males. At the time of the robbery, John DiGiacomo, an employee of the bank was at a counter in the teller's area facing a wall decoding a check for a customer. At the same time, Edelmira Morales was at her teller's station.

One robber vaulted the counter separating the tellers' area from the public area of the bank, landing in the vicinity of DiGiacomo. This robber wore a cap, pulled down over his forehead and also, for a time had a mask pulled over the top of his mouth from below his chin.

Brandishing a hand gun and a canvas bag, he immediately enlisted DiGiacomo's aid in going to each of three tellers' stations to remove cash from their drawers. While withdrawing cash from the first teller's drawer, DiGiacomo tripped the bank's silent alarm which also activated the two surveillance cameras within the bank.

(While the coffers were being emptied, a confederate relieved the bank guard of his gun, and controlled the public area of the banking floor.)

After the tellers' drawers were emptied, the first robber revaulted the counter and exited the bank. (H. 129-133, 182-187; Tr 49-59, 68-76, 137-140.)\*

The confederate then ordered all present to come to the center of the public bank floor, lie down, and to remain motionless for a couple of minutes. This having been done, he, too, made a safe getaway from the bank. The entire robbery lasted approximately two minutes or less (H. 146, 173).

That very day, February 2, 1976, the Federal Bureau of Investigation and the New York City Police Department commenced their investigation. The agents

\* "H" refers to the pre-trial hearing transcript and "Tr." refers to the trial transcript.

conducted a forensic examination of the bank counter areas, did a crime-scene search, and interviewed witnesses (H. 63-64).

During the course of this investigation, nine latent "lifts" were taken including a palmprint impression from the top of the teller's counter. In addition DiGiacomo, Morales and others were interviewed.\* (Tr. 184-91; H. 63-64).

Shortly after the robbery, on February 5, 1976, the bank employees were shown blow-ups of the surveillance film and a "montage" depicting both robbers in a dual photograph. (H. 111-116).

C. THE ARREST OF BLANCHARD  
AND BOWMAN

On February 11, 1976, nine days after the bank robbery, Michael Blanchard was arrested on another charge and confessed to the February 2nd robbery in Long Island City, indicating he was the confederate in the public area of the bank. (H. 73)

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\* No record was made of the DiGiacomo interview. (Tr. 36)

On February 12th, one Junius Bowman was arrested together with another individual, in the possession of two hand guns, including the gun taken by Blanchard during the robbery. Agents of the FBI were notified of the seizure of the gun and Bowman became a suspect (H. 261-62; Tr. 413-16).

Late in the night of February 12, 1976, the same day of Junius Bowman's arrest, Margaret Bowman, a girlfriend of Wallace Jarvis, and the aunt of Junius Bowman, received a telephone call from her sister Barbara Bowman, who was Junius' mother and Margaret's sister. Barbara told Margaret of Junius' arrest in the possession of some guns. After Barbara hung up, Margaret told Jarvis, who was in her apartment, that her nephew Junius (also known as "Ricky") had been arrested with some guns. Upon learning this fact, Jarvis, according to Margaret Bowman, admitted to Margaret that those guns were involved in the bank robbery, which he admitted taking part in. Margaret later claimed that Jarvis threatened her not to mention his slip of the tongue (H.227;Tr. 250-51). Margaret Bowman told her sister Barbara of these events much later in May, but Barbara, at least for the time being, kept them to herself (Tr. 389).

D. THE EARLY PHOTOGRAPHIC  
IDENTIFICATIONS

After Blanchard's arrest, his photograph was shown, on February 23rd, to DiGiacomo and another bank employee, both of whom identified Blanchard. Agent Wichner very candidly admitted that after the two eye-witnesses made the identification, he told them that they were "successful" and made a "valid" or "correct" identification. When questioned about his identification procedures, Agent Wichner testified:

Q At that time did you notify him by any means whatsoever whether suggestion or thought or rather by gesture or statement that the individual he had selected as one who had confessed two days before?

A I do not recall.

Q Well, --

A I advised him that the individual he picked out of the lineup was the individual that robbed the bank and he made, in my professional opinion, a valid identification.

Whether I told him that we had obtained a signed statement, I do not recall giving him that information.

Q In other words, you told Mr. DiGiacomo subsequent to his identification of Blanchard that he had at least in your view been successful?

A Affirmative.

Q Okay.

Was he pleased?

A Was he pleased? I don't know.

Q Did he say anything with respect to his attitude or feeling subsequent to being notified by you that his selection of Blanchard from the photographic spread was a -- at least in your view -- one with which you agreed?

A I think he was pleased, yes.

Q Were there any other witnesses at the time that Blanchard's photograph was shown to, were there any others that identified Blanchard?

A Yes.

Q Who were they?

A Patricia Brundage.

Q And any others?

A Who identified Blanchard?

Q Yes.

A No.

Q Was Miss Brundage told subsequent to her selection of the photograph that at least in your view she had selected the man who was in fact the bank robber?

A I cannot testify that I specifically told her that, but it's customary that we usually would tell a witness that they made a proper identification.

Q Mr. Wichner, when you say a correct identification --

A Based upon my professional opinion, if you will.  
(H. 73-75; 93) (Emphasis added).

DiGiacomo also recalled being assured that "that's the fellow"  
(H.162).

At the time of the Blanchard identification on February 23, Wichner showed a number of photographic spreads to bank employees in an attempt to identify the robber behind the teller counter. Since Bowman had been arrested in possession of the gun taken from the guard in the robbery, Wichner naturally suspected Bowman and put his photograph in one of the spreads. Mrs. Morales identified the photograph of Bowman as "most closely resembling the robber behind the teller counter." (H. 58, H. 118-20, Tr. 140-142.)"

At the time of the first photographic spread viewed by Morales, Agent Wichner showed blow-ups of frames from the bank surveillance film, depicting the robber behind the teller counter, as well as a "montage" - a combination of photographs of both robbers taken from the surveillance films (H. 111-116), a practice he repeated later on in the investigation (E.g., H. 133, 134, 209; Tr 92).

Some time after Morales made this tentative identification of Bowman and her choice was approved by Wichner, she was later given the impression from the F.B.I. that she was wrong as to Bowman (H. 191-93).

E. THE ARREST OF  
JARVIS

On April 8, 1976, the government obtained an indictment charging Blanchard and "John Doe" with violating Title 18, United States Code, §§ 2113(a), (d) and 2. A "John Doe" warrant also issued\*, but there was no description of this "John Doe" in either the indictment (Defendant's Exhibit I), or the Warrant (Defendant's Exhibit L ).

Agent Wichner, during April of 1976, made some progress in his attempt to identify the unknown robber. Although Junius Bowman turned down an invitation to be interviewed by Wichner in state prison (where he was incarcerated awaiting trial on his local arrest) (H. 262), Junius' mother, Barbara Bowman, decided to approach the F.B.I. Eventually, Barbara Bowman told Agent Wichner of Margaret's conversation as to the events of the night of February 12th. Wichner learned these facts from Barbara on April 14th, (including Wallace Jarvis' name). However, he did not act on the information until April 19, when he asked the Assistant United States Attorney for instructions. The Assistant, who had presented the \* No transcript was made of the application for this warrant, which was ordered by the District Court. Docket Sheet p.1.

case to the Grand Jury and who prepared the "John Doe" warrant, authorized Wichner and his colleagues to arrest Jarvis on that warrant (H. 224-236, 265-70).

On April 20, 1976, Wallace Jarvis was in bed with his common-law wife in the home that he owned in Queens. The agents arrived, made forcible entry and arrested Jarvis, who was told they had an arrest warrant, which was never shown to him (H. 238-241, 297-99, 310-312).

At F.B.I. headquarters, Jarvis was "processed", fingerprinted (including his palms), photographed and interviewed.

F. MORE PHOTOGRAPHS  
AND A LINEUP

Armed with photographs of Jarvis, his new suspect, Wichner re-interviewed DiGiacomo, Morales and other bank employees on April 22nd. DiGiacomo, who had been told that his last selection - Blanchard - had pleaded guilty (H. 154-56, Tr. 97) selected Jarvis' photograph. (H. 40-48, Tr. 76-80).

During Wichner's interview with DiGiacomo, he showed him enlargements of bank surveillance photographs and the "montage" (H. 47-49, 50-52, 111-116, 120-21).

DiGiacomo, after selecting Jarvis, was told by Wichner that his identification of Jarvis was correct or in agreement with his own (H. 105, 162-63).

Mrs. Morales, who had been told in the meantime that her selection of Bowman was incorrect, (H. 193), was shown a spread of photographs (together with surveillance photographs and the "montage"), with Jarvis among them but she failed to make an identification (H. 111-113, 121-22). This spread did not re-include Bowman (H. 90).

On the same day the photographs were shown to Morales and DiGiacomo, the government obtained a new indictment - naming Wallace Jarvis and Michael Blanchard. (Defendant's Exhibit J ).

Apparently not satisfied with the success of DiGiacomo's photographic selection of Jarvis, and eager to give Morales another chance to identify him, the government conducted a lineup at F.B.I. headquarters. Counsel for Jarvis was permitted to be present during the viewing but not during the post-viewing interviews when statements were written by the agents. (H. 101). Junius Bowman was also in the lineup at the request of Jarvis' attorney (H. 58)\*.

\*Jarvis' first attorney was relieved at his own request shortly after the lineup. Jarvis has since had the same counsel at trial and throughout this appeal.

Mrs. Morales, now undergoing her third chance to identify the robber, was first shown more surveillance photographs (H. 113). She then viewed a lineup with Bowman (whom she knew was the incorrect choice), Jarvis (who had been in a photo spread she was shown only a week before) and others who were not in the previous photospreads (in February or April). Not surprisingly, she selected Jarvis. (Tr. 143-45).

DiGiacomo, having selected Jarvis' photograph the previous week, and having fresh in his ears Agent Wichner's approving words "You made my day", felt that the F.B.I. had their man and picked Jarvis without any trouble at all, especially since, he, too, was shown surveillance photographs the day of the lineup (H. 111-113, 167, 178, Tr. 80-83, 109-110).

The lineup, other than containing Jarvis and Bowman, did not apparently contain any individuals previously in the several spreads shown to Morales or DiGiacomo (government's exhibits 3500-10; 3500-6; and Defendant's Exhibit B). (H. 81, 87).

Both Morales and DiGiacomo were told that Wichner agreed with their lineup selection (H. 109-11 ; H. 123-24, Tr. 121).

### G. THE PRETRIAL HEARING

Below, Jarvis moved to exclude the eyewitness and palmprint identification testimony as being the fruits of an arrest that was illegal because a proper arrest warrant was not obtained under circumstances requiring one. Additionally, he moved to exclude the eyewitness identification testimony on the additional ground that the pre-trial procedures utilized by the F.B.I. were unnecessarily and impermissibly suggestive (H. 12-22).

On July 15, 1976, Judge Pratt denied all defense motions from the bench in<sup>an</sup> oral decision reproduced in an appendix to this brief (A7-A16).

Judge Pratt ruled, contrary to defense argument, that the warrant may be sustained by referring to extrinsic facts. The Court pointed to the indictment itself and the specific crime charged but did not elaborate except to hold that "the extrinsic evidence which was available was sufficient, proper, clear identification of the defendant as the person sought in the warrant."

(A 8 - A 9). Alternatively, Judge Pratt held that Section 3052 of Title 18, United States Code, is sufficient authority to authorize the warrantless arrest of Jarvis, since there was probable cause for believing that he was the bank robber (A 9 - A 10).

Finally, Judge Pratt denied the motion to exclude the eyewitness testimony, finding that during the bank robbery, both witnesses had a "good opportunity" to observe the robber and were "certain" of their identification at the line-up. Judge Pratt rejected the contention that Wichner's reassurances influenced the witnesses (A 11 - A 16).

## H. THE TRIAL

The case began with the testimony of the two eyewitnesses -- Morales and DiGiacomo. The Government then showed that Jarvis' palmprint was lifted from the top of the teller's counter in the vicinity of where the robber vaulted into the teller's area.\*

The Government also called Margaret Bowman to testify to the alleged admissions by Jarvis concerning the robbery and guns on the night of February 12, when Margaret Bowman learned of Junius Bowman's arrest (Tr. 250-58). Junius Bowman then testified that on February 12, 1976 he removed the two handguns (one of them belonging to the bank guard) from Margaret Bowman's kitchen and was later arrested (Tr. 413-419).

A defense fingerprint expert, Patrick Fusci, agreed that the palmprint was Jarvis', but noted that it is impossible to tell with any degree of certainty when a finger- or palmprint is made (Tr. 513-15).

Jarvis, never before arrested, testified and maintained his innocence. He explained that he was frequent at the same bank while a student at LaGuardia Community College the year before (Tr. 530). He also was in the bank to change bills during late 1975 (Tr. 537).

\* Agent Lagatol testified that the latent palmprint lifted from the counter was pointed in a direction indicating that the owner of the palm was inside the teller's area when the impression was made. On cross-examination, however, he could not explain how he was able to remember this fact when he made no written note of the direction of the palmprint (Tr. 206).

Several checks, including one from the U.S. Government and two from LaGuardia College, were introduced into evidence showing that they were cashed at the bank by Jarvis (Tr 530-36). (DiGiacomo had described a check-cashing program at the bank for LaGuardia College students as including young black males (Tr. 117-20).)

Jarvis admitted knowing both Junius Bowman and Michael Blanchard (Tr. 523-24). He explained that he had an on-going affair with Margaret Bowman, but that he began cooling the relationship in early 1976 (Tr. 520-23).

As to the day of the robbery, he could not give his exact location, but remembered being at Margaret's the day of a big snowstorm, possibly on February 2nd (Tr. 528-29). Finally, Richard Granath, associated with Jarvis in a food business venture, testified as a character witness for Jarvis (Tr. 567).

#### I. DR. BUCKHOUT'S TESTIMONY

The defense also called Dr. Robert Buckhout, Professor of Psychology at Brooklyn College and the Director of the Center for Responsive Psychology. Dr. Buckhout is a leading and judicially-recognized\* expert in the

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\*See United States v. Russell, 532 F2nd 1063, 1066 6th Cir. 1976).

new field of the psychology of eyewitness identification (Tr. 468-71). Buckhout's testimony was offered for the purpose of explaining the psychological factors which are present in the giving of eyewitness testimony (Tr. p. 476).\*

Dr. Buckhout began his testimony by explaining that human visual perception is severely selective and can be limited by various factors, including the existence of a social pressure, to make an identification (Tr. 475). Buckhout particularly emphasized the difficulties in communication between the investigators and the potential eyewitness. He stated that telling a witness the results of a photo selection, that is, telling him his selection is correct or incorrect, re-starts the entire memory process so that later identifications stem from the photographic display, and not the actual real-life encounter (Tr. 485). Indeed, a suggestion by the investigator as to the witness' success need not be purely verbal. Slight body movements, even if unintentional, can communicate the investigator's agreement with the witness's selection (Tr. 489).

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\*Dr. Buckhout, as a matter of course, refuses to pass on the accuracy or reliability of any individual witness' identification testimony. Rather, he confines his own opinion testimony to those factors present in the psychology of eyewitness identification techniques (Tr. 501).

Buckhout then pointed out that inserting a suspect in more than one test (photographic spread or line-up) tends to give the witness a psychological clue that the "repeated" suspect is the choice. A witness seeing a prospective choice of a suspect tends to rely less on his pure perception than his hypothesis of why that suspect is put in the new tests (Tr. 486).

In addition, Buckhout stated that the showing of surveillance photos to witnesses is "highly suggestive" because it is extremely difficult for a witness to determine the actual basis for his identification -- the original encounter, photograph, or lineup (Tr. 489, 499).

He agreed that "it would be extremely difficult to determine when a witness is identifying someone from his own actual memory of an event or whether he is actually confusing his mind, his memory with an image he's seen in another photograph, if he is shown photographs before, for instance, a live lineup...." (Tr. 499).

Other factors affecting the identification, according to Buckhout, include the tendency of witnesses to embellish the details with the passage of time (Tr. 495), and that most people, in estimating the duration of an event, double it (Tr. 498). He also stated that cross-racial identifications are less accurate.\*

\* Jarvis, and concededly the bank robber, are black. Both DiGiacomo and Morales are white.

ARGUMENT

POINT ONE

THE ARREST OF JARVIS BY FORCIBLE ENTRY INTO  
HIS RESIDENCE AND WITHOUT A VALID WARRANT  
WAS UNLAWFUL AND THE PALMPRINT AND SUBSEQUENT  
EYEWITNESS IDENTIFICATION SHOULD HAVE BEEN  
SUPPRESSED

On April 20, 1976, Appellant Wallace Jarvis was arrested inside his own home in Queens after F.B.I. agents made forcible entry.

The "John Doe" warrant on which he was arrested had been issued on April 8th. Although the Agents had not developed much evidence of Jarvis' identity since the robbery on February 2nd, on April 14, 1976, Agent Wichner had learned the name Wallace Jarvis and was told that the robber in the surveillance photographs was Jarvis (Tr. 22).

It was not until April 19, 1976, however, that this crucial information was relayed to the U.S. Attorney's office at which point his arrest was authorized under the "John Doe" warrant issued previously.

Finally, on April 20, 1976, after having first ascertained Jarvis' presence in the house by telephoning there, the agents forcibly entered and arrested him. On the same day, he was "processed", photographed, fingerprinted, and arraigned. Copies of the photographs taken at this time were included in the "spreads" shown to Morales and DiGiacomo on April 22, 1976. Jarvis' palmprint was received at F.B.I. headquarters in Washington on April 26th, and on the same day, a superceding indictment was filed substituting Wallace Jarvis for "John Doe".

- A. UNDER THE CIRCUMSTANCES OF THIS CASE, THE FOURTH AMENDMENT REQUIRES A VALID WARRANT TO MAKE A FORCIBLE ENTRY INTO A PRIVATE DWELLING TO MAKE AN ARREST

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." (Emphasis added)

Although there is a question whether, under current judicial interpretation, the Fourth Amendment requires a warrant for the arrest of an individual in a public place,

United States v. Watson, 423 U.S. 411 (1976); United States v. Santana U.S. , 44 U.S.L.W. 4970 (1976), the Supreme Court has expressly avoided deciding whether a warrant is required for an arrest inside a private dwelling. Indeed, the Court opinion in Watson, and the concurring opinions of Justices Stewart and Powell are emphatic in noting that this question was not reached. United States v. Watson, 423 U.S. at 4114 n.6, 4116 and 4118.

At least five Federal Circuits have decided that the warrantless arrest of a suspect by forcible entry into his home is unlawful in the absence of exigent circumstances. Dorman v. U.S., 435 F.2d 385, (D.C. Cir. 1970) (en banc); Vance v. North Carolina, 432 F. 2d 984 (4th Cir. 1970); U.S. v. Shye, 492 F.2d 886 (6th Cir. 1974); Salvadore v. U.S., 505 F. 2d 1348 (8th Cir. 1974); U.S. v. Phillips, 497 F.2d 1131 (9th Cir. 1974).

In addition, the highest courts of at least three states have even more recently held, reversing prior case law, that a warrant is required under the Fourth Amendment to forcibly enter a private residence for the purposes of arresting a suspect absent exigent circumstances. People v. Ramey, 545 P.2d 1333 (Sup. Ct. Calif 1976); Commonwealth v. Forde, 329 N.E. 2d 717 (Sup. Jud. Ct. Mass. 1975); State v. Lasley, 236 N.W. 2d 604. (Sup. Ct. Minn. 1975).

Indeed, in Ramey, decided one month after Watson, the California Supreme Court held that:

"the protection of the Fourth Amendment of the federal Constitution against violation of the right of the people to be secure in their persons and houses against unreasonable seizures applies to arrests within the home, and that warrantless arrests within the home per se unreasonable in the absence of exigent circumstances." People v. Ramey, 545 P. 2d 1333, 1340-1341. (Emphasis in the original).

With this holding Appellant Jarvis agrees and urges its adoption by this Court.

The rationale of the Court in Santana was that the defendant in that case, having been just seen in public and having just entered her house, had "no expectation of privacy". 44 U.S.L.W. at 4971. Appellant Jarvis, it is respectfully submitted, could hardly have been in a more private place - where the "expectation of privacy" is strongest.

There are additional distinctions between this case and the Supreme Court's recent decisions.

The defendant in Watson was in a public area and had given up the privacy enjoyed in the shelter of a home. Watson v. United States, supra\*. Miss Santana had apparently attempted to avoid arrest by entering her house, Santana v. U.S., supra\*\*

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\*The Court opinion in Watson also took note of the fact that Watson was committing a felony in the presence of the postal inspectors, a factor totally absent from Jarvis' case. 44 U.S.L.W. at 4112.

\*\*In Santana, there was the additional factor of the possibility that evidence of a crime would be destroyed, 44 U.S.L.W. at 4972 there is not even a hint of such a possibility here.

Unlike those individuals, Wallace Jarvis was lying in bed with his wife in a home that he owned when the agents broke in to arrest him.

It is an apparent quirk of Fourth Amendment history that little challenge has been posed to evidence seized upon a warrantless arrest on the basis that a warrant was required. Indeed, Justice Powell noted that the decision of the Ninth Circuit, reversed in Watson, was "virtually unprecedented". 44 U.S.L.W. at 4118 (concurring opinion).

One reason for this lack of precedent is that the common-law rule permitting warrantless arrests for felonies was adopted in early state and federal statutes\* and not challenged on Fourth Amendment grounds. See U.S. v. Watson, 44 U.S.L.W. at 4114-15. As early as 1894, however, the Supreme Court had occasion to note that federal and state laws governing arrest procedures are "necessarily subordinate" to the Fourth Amendment. West v. Cabell, 153 U.S. 78, 86 (1894).

Despite the dearth of early litigation on the issue, it can hardly be disputed that the Fourth Amendment by its

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\*The government will point out that Judge Pratt below found constitutional Section 3052 of Title 18, United States Code, permitting F.B.I. Agents to "make arrests without warrant ... for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." Appellant Jarvis contends that this provision insofar as it applies to the authority of agents to forcibly enter private homes to make an arrest in the absence of exigent circumstances, is unconstitutional.

language applies to arrests as well as to searches. While under Watson, warrantless felony arrests in public may now be considered "reasonable" under the Amendment, it cannot be said that the same applies to the facts of this case. For here the "expectations of privacy" were present in force. As Justice Powell wrote,

"Indeed, as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater. A search may cause only annoyance and temporary inconvenience to the law-abiding citizen, assuming more serious dimension only when it turns up evidence of criminality. An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent. Although an arrestee cannot be held for a significant period without some neutral determination that there are grounds to do so, ... no decision that he should go free can come quickly enough to erase the invasion of his privacy that already will have occurred. Logic therefore would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches." 44 U.S.L.W. 4117 (citations omitted).

Justice Powell concurred in the decision in Watson, reasoning that, despite the Fourth Amendment's equal treatment of arrests and searches, "history and experience" dictated the result. Appellant Jarvis respectfully submits to this Court that such a result is not dictated by the distinguishing facts of this case, especially where the federal agency involved purportedly follows the practice of obtaining warrants. United States v. Watson, supra 44 U.S.L.W. at 4123 (dissenting opinion of Justice Marshall citing Brief of the United States p. 26, n.15).

The Government cannot claim that exigent circumstances justified Jarvis' arrest without a proper warrant. Indeed, contrary to any exigent circumstances present here, the agents were rather tardy in their apprehension of Jarvis even after they believed they had probable cause as to his identity. It was on April 14th that Agent Wichner learned of Jarvis' identity, although he certainly had indications beforehand.\* Instead of acting immediately, Agent Wichner waited five days and then contacted the Assistant U.S. Attorney. The Assistant then authorized the arrest, which took place the next day -- April 20th.

In both People v. Ramey, 545 F.2d 1333 (Cal. 1976) and Commonwealth v. Forde, 329 N.E. 2d 717 (Mass. 1975), the passage of three hours between the acquisition of probable cause and the arrest of the suspects was deemed conclusive of the lack of sufficient exigent circumstances to justify the failure to obtain a warrant. Here, the delay in arresting Jarvis was some forty-eight times longer. Clearly, then, Jarvis' arrest was without any "exigent circumstances" justifying his arrest without a valid warrant.

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\*Indeed, as early as February 12, 1976, there was substantial evidence linking Jarvis to Blanchard. The inventory of Blanchard's possessions taken after his arrest on February 11, 1976 revealed that he had in his possession a card bearing an address, a phone number, and the word "JAY". The address turned out to be the one at which Jarvis resided with his common-law wife and the phone number was in her name. No further effort was made to determine Jarvis' identity using the address found on Blanchard. Agent Wichner did not check water company records, or the County Clerk's office, where he would have discovered Jarvis as the owner of record of the premises (H. 260).

B. THE "JOHN DOE" WARRANT IN  
THIS CASE WAS INVALID

The warrant issued on April 8, 1976 for the arrest of "John Doe", contained no description or alias whatsoever. As such it was a nullity under the Fourth Amendment which only permits warrants "particularly describing...persons... to be seized". In furtherance of this constitutional mandate, Rule 4(c)(1) of the Federal Rules of Criminal Procedure states: "The warrant...shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty.\* (Emphasis added).

The "particular description" requirement of the Fourth Amendment, and the "identified with reasonable certainty" mandate of Rule 4 were totally ignored in this case by the United States Attorney's office which handled this prosecution. The failure to meet these standards made the warrant invalid.

In West v. Cabell, 153 U.S. 78 (1894), an individual named Vandy M. West sued for false arrest against the local United States marshal and his deputies, who arrested the plaintiff, Vandy West, upon a warrant issued by a United States commissioner, on the charge of murder on an Indian reservation.

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\*Rule 4 pertains to warrants issued upon complaints. Rule 9(b)(1) adopts the same standard for warrants issued upon indictments.

The warrant called for the marshall to "arrest the body of James West". Vandy West, on the contrary, "had...borne a good character as a peaceable man, and was not the murderer ..." but, was kept in jail for over three weeks before the commissioner released him after his mistaken identity had been disclosed. The appeal in the case, from a verdict and judgment for the defendant, concerned the propriety of the instructions to the jury concerning the defendants' reliance on the warrant issued by the commissioner. The Supreme Court reversed the judgment and reasoned that "the principal of the common law, by which warrants of arrest, in cases criminal or civil, must specifically name or describe the person to be arrested, has been affirmed in the American Constitution; and by the great weight of authority in this country a warrant that does not do so will not justify the officer making the arrest." 153 U.S. at 86. Thus, the Court ruled it was erroneous for the jury to be instructed that "the private intention of the magistrate was a sufficient substitute for the constitutional requirement of a particular description in the warrant." 153 U.S. at 88. Likewise, the private intentions of the District Court below in issuing the "John Doe" warrant and any knowledge de hors the warrant on the part of the F.B.I. agents is irrelevant to the failure of the warrant to meet constitutional standards.\*

\*No proceeding was had to insure probable cause of Jarvis' identity after his arrest. When Jarvis was brought before the District Court in this case, the Court addressed the United States Attorney asking "is this the man named in 76 CR 253?", to which the Assistant United States Attorney answered quite simply "yes, your Honor." (Transcript of April 20, p. 3).

West was relied on by a District Court in United States v. Swanner, 237 F.Supp. (E.D. Tenn. 1964), where an individual was arrested on a warrant naming "John Doe alias Bud Ferguson." Swanner was mistakenly arrested pursuant to the warrant, and although the arrest was sustained on other grounds, the Court was concerned with the practice of using "John Doe" arrest warrants, in "in view of the dearth of authority upon the use of such warranties by federal officers" held:

"The issuance of warrants in the fictitious name of "John Doe" appears to be permissible under the statutes or practice of some states, where a particular person is in fact intended, such person known by sight but not by name. See "The Tennessee Law of Arrest," 2 Vand.L. Rev. 509. However, in the federal practice the use of such fictitious names without more would clearly violate not only the language of Rule 4(b), Federal Rules of Criminal Procedure, but would likewise fail to meet the requirements of the Fourth Amendment of the United States Constitution. Some further description of the person intended to be designated by the warrant would be required.

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"While it might with reason be contended that the constitutional prohibition of general warrants would be met if a particular person was in fact intended and the Court might look to the knowledge and intent of the officer issuing the warrant or the officer serving the warrant in making a determination of whether a particular person was intended and what particular person was intended, the issue appears to be decided otherwise, in the case of West v. Cabell, 153 U.S. 78, 14 S. Ct. 752, 38 L.Ed. 643 (1874)". 237 F.Supp. at 71.

In contrast to West v. Cabell, and United States v. Swanner, Judge Pratt held below:

"I cannot accept the argument that extrinsic evidence may not be used in conjunction with the warrant. Logic compels the conclusion that no piece of paper may identify either a person or place. Extrinsic evidence is always necessary ...here we have a warrant which within the operation of the Government, that is the U.S. Attorney's

office, the F.B.I., the Grand Jury, the warrant is clearly and historically here tied to the indictment itself. It charges a specific crime. It is a crime committed by two individuals, one of whom was identified as John Doe rather than as Wallace Jarvis for the reason the name of the individual was not known. In order to take the charged defendant into custody it was necessary, as it always is necessary, to relate the words of the warrant to the body which is to be seized. That, as I said, requires extrinsic evidence. There's no question here but that the extrinsic evidence which was available was sufficient, proper, clear identification of the defendant as the person sought in the warrant (H. 391-92; A7-A9).

Judge Pratt did not distinguish West\* or Swanner, cited to him by Appellant's counsel.

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\* West v. Cabell has continuing vitality despite its age. Indeed, it was cited in the legislative history of Title 18, United States Code, §2518(4)(a), which requires an electronic surveillance order to specify the identity of the person against whom the warrant is sought. S. Rep. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. and Admin. News p. 2191. See also United States v. Bernstein, 509 F.2d 996, 999n. (4th Cir. 1975), which relied on Congressional citation of West in suppressing wire-tap evidence. See also United States ex rel. Savage v. Arnold, 403 F.Supp. 172, 195 (E.D. Penn. 1975).

The Supreme Court in West relied on a host of early state cases, including Commonwealth v. Crotty, 10 Allen 403 (Sup. Ct. Mass.) which held that a "John Doe" warrant was "in effect a general warrant upon which any other person might as well have been arrested, as being included in the description." Crotty was itself recently relied upon by the Supreme Judicial Court of Massachusetts in Connor v. Commonwealth, 363 Mass. 572 (1973) in reversing a conviction and dismissing an indictment brought against a "John Doe". What the Court said in Connor about a "John Doe" indictment is equally applicable to a John Doe warrant:

"The name 'John Doe' gives no clue to identity. Standing alone it is synonymous with anonymity. The indictment of John Doe is the indictment of anyone. The indictment of anyone is the indictment of no one. The indictment of no one is an indictment in blank." 363 Mass. at 578.

See also Connor v. Picard, 434 F.2d 673 (1st Cir. 1970), reversed on other grounds, 404 U.S. 270 (1971). Compare the effort by the Government in this case to identify its "indicttee" with the facts of United States v. Doe, 401 F.Supp. 63 (E.D. Wisc. 1975).

The requirement of a description in a warrant is no mere technicality. There is little question that, even with probable cause to arrest an individual whose name is known that mistakes can and have indeed been made. United States v.



Rosario, 543 F.2d 6 (2d Cir. October 29, 1976, Slip Op. p. 89) concerned the arrest of an individual known only to federal agents as "John Doe 'Angel'", together with a physical description. Despite the description and the first name "Angel", narcotics agents arrested the wrong man. The District Court suppressed evidence found on the person of the defendant and this Court affirmed.

There can be little question in this case that the John Doe warrant executed against Wallace Jarvis in the privacy of his home was indeed, a "general warrant" such as was abhorrent to the founding fathers' ideas of the proper restraints on governmental abuse. As such, it hardly complied with the requirements of the Fourth Amendment and the criminal rules.

C. THE PALMPRINT AND PHOTOGRAPHS TAKEN OF JARVIS WERE FRUITS OF HIS ILLEGAL ARREST AND SHOULD HAVE BEEN SUPPRESSED.

The illegal arrest of Jarvis led directly to the taking of his photograph which was displayed immediately thereafter to Morales and DiGiacomo. His continued illegal detention led to his being viewed at a lineup by the same eyewitnesses. More direct fruits of an unlawful arrest are difficult to imagine.\*

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\* The speed with which Jarvis' photograph was displayed and a superceding indictment obtained (two days after arrest) stands in marked contrast to the six day delay between the ripening of probable cause as to Jarvis' identity and his arrest.

It is indisputable that these events led to Jarvis' in-court identification by Morales and DiGiacomo. Since their testimony derived directly from Jarvis' unlawful arrest and detention, their testimony was improperly admitted.

Likewise, the palmprint taken from Jarvis at his arrest led directly to the F.B.I. laboratory's successful comparison with the palmprint found in the bank. It too, was surely a direct fruit of the arrest and should have been suppressed.

Before treating each evidentiary "fruit" separately, it is respectfully submitted that Appellant Jarvis' argument goes to the heart of current Fourth Amendment law and the future of the exclusionary rule. Indeed, since the well-established warrant requirement for searches carries the penalty of suppression for its violation, Weeks v. United States, 232 U.S. 383 (1914), even if the agents are acting in good faith reliance on a Magistrate's decision, United States v. Karathanos, 531 F.2d 26 (2d Cir. 1976) cert. denied U.S.

, 96 S. Ct. 3221 (1976), there can be no reason for not invoking the same sanctions to warrantless arrests made, albeit with probable cause, in the narrow area where a valid warrant should be obtained - for a forcible entry and arrest inside one's own home, United States v. Dorman, supra; People v. Ramey, supra, even where agents are relying on instruments drafted

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by an Assistant U.S. Attorney. The exclusionary rule which Appellant Jarvis advocates in this case "should be looked at as the principal means for ensuring governmental performance of the obligations imposed by the Fourth Amendment upon the system of criminal justice as a whole...[as] a broad regulatory cannon...which keeps us all secure against the conduct it condemns." United States v. Karathanos, supra at 35-36 (concurring opinion of Judge Oakes). Indeed, sanctions against the use of any evidence seized during an illegal warrantless arrest is a mild form of available deterrence in view of the more drastic relief of an illegally arrested defenant's being set free from prosecution entirely - a remedy that has not generally been imposed, Frisbie v. Collins, 342 U.S. 519 (1952); but see United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

#### 1. The Palmprint Testimony

Given the illegality of the initial arrest, the fruits of that illegality are subject to the exclusionary rule whether the fruits include a confession, Brown v. Illinois, 422 U.S. 590 (1975); an eyewitness, United States v. Ceccollini, 542 F.2d 136 (2d Cir. 1976), "mere" physical evidence, Warden v. Hayden,

387 U.S. 294 (1967) or fingerprints. Davis v. Mississippi,  
394 U.S. 721 (1969); Bynum v. United States, 262 F.2d 465  
(D.C. Cir. 1958). While the facts in Davis indicate a whole-  
sale "round-up" of a number of suspects for the purpose of  
obtaining evidence, the Fourth Amendment exclusionary rule  
is blind to the question of good faith on the agents' part.  
United States v. Karathanos, supra at 33.

## 2. The Eyewitness Identification

The photographs taken of Jarvis at his arrest were as direct a fruit of that arrest as his fingerprints. See United States v. Johnson, 452 F.2d 1363, 1372 (D.C. Civ. 1971) (Bazelon, C.J.). The subsequent use of the photographs two days later was a direct use or "exploitation" of the evidence illegally seized. Wong Sun v. United States, 371 U.S. 471 (1963).

Because the photographs themselves led directly to the subsequent line-up and in-court identifications, (see Point Two, infra), the eyewitness testimony should likewise be suppressed. United States v. Barragan-Martinez, 504 F.2d 1155, 1157 (9th Cir. 1974). Indeed, in Barragan-Martinez, the court excluded the in-court identification by the witness based solely on the unlawful invasion of the defendant's Fourth Amendment rights resulting in the pre-trial identification.

The government may point to Judge Friendly's opinion in United States v. Edmons, 432 F.2d 577 (2d Cir. 1970) which suggested that an identification resulting from an illegal detention will not always be excludable. However, here, it is submitted that the existence of a warrant requirement for the arrest makes more definite the rules concerning the agent's conduct and makes "precise compliance" easier. Thus, the agents'

good faith should not be a relevant factor. Edmons, supra, at 585. This is not a case where, on the record, the constitutional "violation affected the in-court identification only insignificantly or not at all," Edmons, supra at 585. Rather the photograph was the direct initial cause of DiGiacomo's identification, and was, by its inclusion in the second photographic spread shown to Morales - an overt suggestion (together with the constantly shown surveillance photographs), and caused the ultimate selection of Jarvis on the third attempt. To avoid repetition, the Court is respectfully referred to Point Two, infra, for a full treatment of the argument that the photographs were indeed "exploited" to obtain the eyewitness identifications.

A case which, at first blush might appear to dictate a contrary result is United States ex. rel. Pella v. Reid, 527 F.2d 380 (2d Cir. 1975). On close reading, however, Pella is not adverse to Appellant Jarvis' claim. In Pella, a state habeas corpus appeal, the defendant had been convicted, in part, on in-court eyewitness testimony that was obtained following a lineup and photographic display that took place after an arrest without probable cause. The issue on appeal turned on whether the in-court identification was tainted, since the prosecution had not used the pre-trial identifications. The

Court found "no reason to doubt the...conclusion that the taint of the prior illegality and its pre-trial fruit had been dissipated." Pella, supra at 383. Pella did not deal with the admissibility of pre-trial identifications\* from photographs and detention derived from the illegal arrest. Secondly, in deciding the exploitation issue, the Court relied on its finding that the procedure was not "conducive to irreparable mistaken identification". Pella, supra at 384. In applying this test, the Court seemed to ignore (and did not cite) the test enunciated by Judge Friendly's opinion in Brathwaite, infra, decided only three weeks before Pella. (See Point Two, infra).

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\*Both DiGiacomo and Morales testified, over objection, to their pre-trial selections of Jarvis in the photo spread and lineup.

POINT TWO

THE UNNECESSARILY AND IMPERMISSIBLY SUGGESTIVE  
PRE-TRIAL TACTICS USED TO OBTAIN THE EYE-WITNESS  
IDENTIFICATIONS SHOULD HAVE RESULTED IN THE  
EXCLUSION OF SUCH TESTIMONY

The rule in this Circuit is that, in post-Stovall\* cases, "evidence of an identification unnecessarily obtained by impermissibly suggestive means must be excluded" Brathwaite v. Manson, 527 F.2d 363 (2d Cir. 1975) (Emphasis added), cert. granted U.S. , 96 S. Ct. 1737 (1976).

The pre-trial identification procedures utilized by the Federal Bureau of Investigation in this case form a mosaic of suggestivity including a number of investigative tactics previously condemned by this Court as unnecessarily, impermissibly and fatally suggestive.

A. AGENT WICHNER'S TELLING THE WITNESSES  
WHETHER THEIR IDENTIFICATIONS WERE  
CORRECT OR INCORRECT

On February 23, 1976 Special Agents Wichner and Jarrett showed Morales two photographic "spreads" each composed of six photographs. She could identify no one in the first "spread" and in the second "spread" picked out a

\* Stovall v. Denno, 388 U.S. 293 (1967).

photograph of one Junius Bowman as the one that "most closely resembled the robber behind the teller's counter". Morales testified during the Wade hearing that she had learned, after her identification of Bowman but evidently before the lineup, that this selection was incorrect (H. 193).

On February 23, 1976, DiGiacomo was shown a "spread" composed of six photographs and from this display, he identified the photograph of Michael Blanchard as looking like one of the robbers (H. 73-78). Soon thereafter, Wichner advised DiGiacomo "that the individual he picked was one of the bank robbers, and he made, in my (Wichner's) professional opinion, a valid identification." (H. 74). With apparent and commendable candor, Wichner admitted that this practice was "customary" (H. 75).

On April 22, 1976, DiGiacomo was shown another photographic spread in an attempt to identify the robber behind the teller counter.\* From this display, he identified Jarvis. After his choice, he was told, "You made my day" by Special Agent Wichner (Tr. 109). In addition, DiGiacomo testified that he believed (quite naturally) that Wichner knew who the bank robber was (Tr. 110).

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\* According to DiGiacomo the robber behind the teller counter was in the bank less than his confederate (Tr. 100).

It is clear that telling Morales that her selection of Bowman was incorrect had a dramatic effect on her later identifications. After she picked Jarvis out of the lineup, Wichner told Morales that he agreed with her selection (H. 110). The prior notification made to Morales sometime after the Bowman spread was precisely held by the Sixth Circuit to be "extremely suggestive" and could lead to "irreparable misidentification". United States v. Russell, 532 F.2d 1063, 1068 (6th Cir. 1976).

The above tactics, unwitting or not, severely interfered with the independent operation of the witness' memory. Dr. Buckhout stressed that telling the witness whether his selection is correct or incorrect restarts the witness' memory process so that the photographic display replaces, in the witness' memory, the real-life encounter as the basis for later identifications. (Tr. 485). Several courts have agreed with Buckhout and condemned communications of the investigator's opinion of the correctness or incorrectness of the witness' selection to the witness - See, e.g., United States v. Russell, supra.

B. THE REPEATED SHOWING OF THE SURVEILLANCE PHOTOGRAPHS AND THE PHOTOGRAPHIC "MONTAGE"

The second sequence in the mosaic of suggestivity in the identification procedures was the constant showing of surveillance photographs to the witnesses. Incredibly, these witnesses were repeatedly shown surveillance photographs and the "montage"\* as well, on apparently four separate occasions

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\* Defendant's Exhibit F, (containing a combination of two surveillance photographs each, of Blanchard and the other robber ).

-February 5th, February 23rd, April 22nd and April 29th - the day of the lineup (H. 111-116, 133-34, 209, Tr. 92). It is impossible for any fact-finder to be able to learn whether these witnesses identified Jarvis from their own memory or whether they were merely making a comparison, (a readily imaginable result of this type of procedure). Testimony of Dr. Buckhout (Tr. 489).

This court has previously condemned the showing of a single photograph of a suspect at the same time of a lineup or viewing of a photographic spread. Mysholowsky v. People Of The State Of New York, 535 F.2d 194, 197 (2d Cir. 1976). Agent Wichner's explanation for this practice is hardly intelligent or reasonable. Wichner explained that he showed the surveillance photograph "for a brief period of seconds" and then took the photograph from view. Then he promptly showed the spread containing Jarvis' photographs. He stated that it is necessary for the witness "to have a very fast recollection of which subject in the robbery we were concerned with" (H. 92-93). (His explanation loses impact since one robber was identified in early February). Dr. Buckhout characterized the showing of surveillance photographs to a witness as "highly suggestive", emphasizing the extreme difficulty facing a witness when he tries to determine the actual basis for his identification (Tr. 489, 499). The danger exists, Dr. Buckhout explained, that the witness may confuse his memory with the image he has seen in another photograph (Tr. 499).

C. THE REPEATED APPEARANCE OF  
JARVIS IN SEVERAL OF THE  
TESTS

The final example of egregious suggestivity in this case is the repeated appearance of Jarvis in the various tests.

Dr. Buckhout testified, and the United States Supreme Court has also held, that the insertion of a suspect in more than one viewing, whether in photographic spreads or line-ups, is in effect telling the witness that "this is the man". Foster v. California, 394 U.S. 440, 443 (1969) (reversing conviction). According to Dr. Buckhout, where a suspect is repeated in several tests, the witness relies not on his pure perception but on his knowledge that the given suspect is the favorite choice of the investigator (Tr. 486-88). See Hogan v. Poderick, 399 F.S. 1014, 1018 (E.D. Va. 1975).

In the investigation of this case, Morales was first shown a spread including a photograph of Jarvis on April 22, 1976. She could make no identification. (At some point, possibly previous/<sup>even</sup> to this viewing, she had learned that her initial identification of Bowman was incorrect). Then on April 29, 1976, she viewed the line-up in which both Bowman and Jarvis were included. Since Jarvis was the only other participant who had also been present in the photographic spread one week before,

a clearer command as to "who was the man" could not be imagined.\*

In DiGiacomo's case, he was informed by Wichner that his choice of Jarvis from the photographic spread on April 22, 1976 was "correct". Indeed, he testified that he was willing to accept Wichner's assessment of Jarvis' guilt (Tr. 109). Nevertheless, DiGiacomo was brought to the April 29th line-up. The First Circuit recently held:

"subsequent repetitive exercises which do little more than test the witness' ability to again select that photograph are likely to have the effect of fixing that image in the witness' mind with a corresponding blurring of the image actually perceived at the crime." United States v. Eatherton 519 F.2d 603, 608 (1st Cir. 1975) cert. den'd 423 U.S. 987 (1975).

The list of all of the above suggestive tactics is lengthy: the notification to Morales that she was wrong on her first choice, the bolstering of DiGiacomo's initial selection by both a second test and Wichner's enthusiastic and grateful "professional agreement" after each selection, and, finally, the constant exhibition of surveillance photographs clouding any independent recollection of the initial encounter. Under the circumstances, this litany of unnecessarily, even gratuitously, suggestive tactics dictated that the

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\* Morales admitted that she has difficulty recognizing black persons, even known customers at the bank (Tr. 160-62, 168).

identification evidence gained by their use should have been excluded.

While some suggestiveness in the identification may be permissible if necessary, the Government has the burden of establishing circumstances excusing a suggestive technique. Brathwaite v. Manson, 527 F.2d 363 (1975), cert. granted, U.S. , 96 S. Ct. 1737 (1976). If the Government fails <sup>in</sup> this burden, as it has on this record, the identification testimony must be excluded. As Judge Friendly stated in Brathwaite: "No rules less stringent than these can force police administrators and prosecutors to adopt procedures that will give fair assurance against the awful risks of misidentification." Brathwaite, supra at 371.

POINT THREE

THIS COURT UNDER ITS SUPERVISORY  
POWERS OVER FEDERAL PROSECUTIONS  
SHOULD REVERSE THE CONVICTION BELOW

It is respectfully submitted to this Court that, beyond the constitutional mandate of the exclusionary rule as to evidence seized in violation of the Fourth Amendment (Point One, supra), and beyond due process considerations precluding the use of certain suggestive tactics in obtaining eyewitness identification (Point Two, supra), the broad supervisory powers of this Court should be invoked in reversing the conviction.

The power of this Court over the actual methods used by the United States Attorneys of this Circuit is clear. E.g., United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972); United States v. Estelle Jacobs, F.2d (2d. Cir. December 30, 1976; Slip. Op. 1187). The invocation of this power to establish a clear rule in this Circuit as to 1) the requirement for an arrest warrant under the circumstances demonstrated on this record; 2) the impropriety of "John Doe" warrants; and 3) the unfairness of the suggestiveness used by the F.B.I. in this case, would be in appropriate furtherance of the spirit of McNabb v. United States, 318 U.S. 332 (1943), in which Justice Frankfurter wrote:

"A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic." 318 U.S. at 343.

As to the requisite of obtaining a warrant before making forcible entry into the privacy of a man's home, (absent exigent circumstances), it is apparently the practice of the F.B.I. at least, to do so. United States v. Watson,

U.S. , 44 U.S.L.W. 4112, 4123. Requiring such a procedure of all federal law enforcement agencies would promote a consistent standard - one frequent justification for invoking supervisory power. See Jacobs, supra, Slip. Op. at 1192.

As to the "John Doe" warrant utilized in this case, it cannot be stated whether the use of such warrants is a common practice or not. However, in view of the Fourth Amendment's directive, and the specific Federal Rule covering the matter, a reversal in this case would "help to translate [any] assurance of the United States Attorneys into consistent performance by their assistants." Estepa, supra at 1137.

Finally, as to the suggestiveness in the identification procedures, a reversal would establish a helpful benchmark, from which Assistant United States Attorneys would necessarily take guidance and instruct and supervise more closely the agents' investigative techniques, thus minimizing the chances of fatal error.

#### CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT OF  
CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

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January 19, 1977

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\*Counsel for Appellant wishes to acknowledge the helpful assistance of Mr. Ronald J. Lukowicz, a third-year student at Fordham University School of Law.



UNITED STATES COURT OF APPEALS  
for the Second Circuit

United States of America,

Appellee,

-against-

Wallace Jarvis,

Defendant-Appellant.

**AFFIDAVIT  
OF SERVICE  
BY MAIL**

On appeal from the United States District Court  
for the Eastern District of New York

STATE OF NEW YORK,  
COUNTY OF NEW YORK, ss.:

Frank DiBenedetto, being duly sworn, deposes and says that he  
is over the age of 18 years, is not a party to the action, and resides  
at 40 Bay 37 Street Brooklyn, New York 11214  
That on January 20, 1977, he served 2 copies of Briefs

on

Hon. David G. Trager  
U.S. Attorney  
225 Cadman Plaza East  
Brooklyn, New York 11201

by depositing the same, properly enclosed in a securely-sealed,  
post-paid wrapper, in a Branch Post Office regularly maintained by  
the United States Government at 350 Canal Street, Borough of Manhattan,  
City of New York, addressed as above shown.

Sworn to before me this  
20 day of January, 1977

*Frank DiBenedetto*  
.....

*John V. DiProspero*  
JOHN V. DIPROSPERO  
Notary Public, State of New York  
No. 00022150  
Qualified in Nassau County  
Commission Expires March 13, 77